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April 10, 1996

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

APR 11 1996

Re: *FCC 96-99, CS Docket No. 96-46*

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Enclosed is an original and eleven copies of Reply Comments submitted by ESPN, Inc. in the above-referenced proceeding. Per the directions in Paragraph 93 of the NPRM, an additional copy has been delivered to Larry Walke of the Cable Services Bureau and to International Transcription Services.

Please do not hesitate to give me a call (860-584-4493) if there are any questions regarding this filing.

Very truly yours,

Michael J. Pierce
Counsel

/sc

No. of Copies rec'd 0+11

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	

REPLY COMMENTS OF ESPN, INC.

Edwin M. Durso
David R. Pahl
Michael J. Pierce
ESPN, Inc.
ESPN Plaza
Bristol, Connecticut 06010-7454

April 11, 1996

Before the
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In re:	)	
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To the Commission:

REPLY COMMENTS OF ESPN, INC.

ESPN, Inc. ("ESPN"), by its attorneys, hereby submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.[1] ESPN believes that the initial comments have provided the Commission with essentially competing models of how the regulatory architecture of Open Video Systems should be implemented. Rather than focus on the appropriateness of any one of those models, however, ESPN will briefly address several provisions of the NPRM and the initial comments from the point of view of a programming network.

At bottom, ESPN's position is that nothing in Section 653 of the Telecommunications Act of 1996 (the "1996 Act") can in any way be interpreted as derogating the rights of a programming network *vis-à-vis* open video system operators, video programming providers, or any other entity that delivers video programming to subscribers; each distribution arrangement must continue to be undertaken only pursuant

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[1] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, Report and Order and Notice of Proposed Rulemaking (Adopted March 11, 1996; Released March 11, 1996) ("NPRM").

to a specific copyright license agreement with the programming network. ESPN simply desires that the Commission -- while focusing on the competing regulatory models -- not lose sight of the fact that each distributor's ability to deliver video programming over some part of an OVS system must ultimately be subject to the applicable programming network's copyright license with that specific distributor.

I. The Commission's Proposal to Make Contracts Publicly Available Should Only Apply to Contracts for Access or Capacity, Not Program License Agreements

The Commission has proposed that an open video system provider be required to make publicly available its contracts with all video programming providers. Under the Commission's proposal, these contracts will disclose the rates charged to programming providers and other terms and conditions of carriage.[2] The initial commenters disagreed as to whether or not this was an appropriate means of enforcing the anti-discrimination provisions of the 1996 Act.[3]

ESPN asks the Commission to clarify that, regardless of whether or how it decides to require the public availability of rates, terms and/or conditions of OVS carriage, any requirement of public availability will only apply to "capacity" or "access" contracts between the OVS operator and the video programming provider, not program license agreements between a programming network and either an OVS operator or a video programming provider.[4] Potential OVS discrimination will neither be exposed nor

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[2] NPRM at 15.

[3] *See* Comments of Tele-Communications, Inc. at p. 14 ("To afford a meaningful opportunity to police the statutory non-discrimination requirements applicable to open video systems, the agreements under which video programming providers obtain capacity on an open video system should be available for public review.") (emphasis added, footnote deleted). *But see* Comments of Bell Atlantic, et al, at p. 23 ("[T]he mere suggestion of a contract disclosure requirement for new market entrants is nothing short of astounding. Such disclosure would serve only to position open video system operators' rates as an 'umbrella' for their competitors."); *see also* Comments of U.S. West, Inc. at p.7 ("Forced disclosure of privately negotiated contracts smacks of Title II-like regulations.").

[4] *See* Comments of the National Cable Television Association at p.20, n.16.

curbed by the public availability of program license agreements. Moreover, these agreements are frequently the subject of negotiated confidentiality provisions, the breach of which will serve no purpose in the OVS discrimination context.

II. NYNEX Corporation's Proposal to Unilaterally Override Program License Agreements Must Be Rejected

The comments submitted by NYNEX Corporation ("NYNEX") contain the extraordinary proposal that an OVS operator be permitted to unilaterally exclude from carriage on its OVS system those "programs or program series" for which a video programming provider has exclusive rights or "favorable contract terms that effectively preclude others from distributing the program on that open video system."[5] Although the NYNEX Comments do not describe how an OVS operator might implement these selective programming blackouts -- or, indeed, what "favorable contract terms" might "effectively preclude" carriage -- ESPN believes this odd proposal to be absolutely inappropriate and urges the Commission summarily to reject it. (It is also uncertain whether NYNEX proposes to preclude all access by a video programming provider holding exclusive rights, or only to blackout certain programs that are subject to exclusivity arrangements.)

Although not clear, NYNEX's apparent desire to act as a program by program gatekeeper for each video programming provider flies directly in the face of the exclusive rights of a programming network (or indeed, an individual program supplier) to generally determine which entity distributes its programming and the terms and conditions of distribution. NYNEX's apparent rational for this scheme is that "[c]able operators and

[5] Comments of NYNEX Corporation at p. 12.

others may have the economic muscle to extract exclusive or very favorable arrangements with suppliers of programming that is essential to the viability of an OVS program package."[6] Earlier in its Comments, however, NYNEX advocates giving the OVS operator the power to deny capacity to such cable operators.[7] Presumably, NYNEX would like the ability not only to keep cable operators off of its OVS system, but to delete specific programs as well from those they do permit access to.

III. Channel Sharing and Joint Marketing Arrangements Must Be Subject to Approval by Programming Networks

ESPN wholeheartedly endorses the Commission's tentative conclusion that "[p]rogram vendors and licensors [must] remain free to license or not to license their programming for shared use by multiple video programming providers."[8] While the initial comments disagreed in terms of which entity or entities should control the channel sharing decision process,[9] no commenter appears to have disputed the basic premise that all channel sharing arrangements must have the *imprimatur* of the programming network involved.

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[6] Id.

[7] Id. at p. 11 ("It would undercut [the goal of vigorous competition] to force the OVS operator to provide capacity for its principal multichannel competitor -- the cable operator.").

[8] NPRM at 17 (para. 41). *See* Comments of Rainbow Program Holdings, Inc. at p. 22 ("programmers must retain the right to decline to participate in channel sharing") (footnote omitted).

[9] *Compare* Comments of Rainbow Program Holdings, Inc. at p. 22 ("all video programmers on the platform should be involved in the process of selecting the programming for the shared channels") *with* Comments of U.S. West, Inc. at p. 14 ("U S WEST urges the Commission to adopt rules that allow for the greatest discretion on the part of the OVS operator with respect to channel sharing, so long as all parties offering programming on shared channels and their respective subscribers are treated in an equal manner.").

The Commission has also tentatively concluded that subsection 653(b)(1)(B) of the 1996 Act permits an OVS operator and its affiliates to "enter into agreements to market to subscribers the programming services selected for carriage by unaffiliated video programming providers."[10] The Commission believes that the "efficiencies and innovations" resulting from these arrangements may result in the public interest benefits of increased flexibility and more programming options.[11] Again, commenters advance significantly different interpretations of this provision.[12]

ESPN reserves judgment with respect to the anticipated benefits to be reaped by these joint marketing arrangements. However, ESPN urges the Commission to clarify, as it has in the channel-sharing context, that these arrangements may only be undertaken pursuant to the terms and conditions contained in program license agreements between programming networks and OVS operators or video programming providers. Program license agreements frequently contain negotiated provisions related to the marketing of a programming service, including specific trademark use guidelines. In addition, programming networks themselves are frequently under contractual restraints as to the use of program vendor trademarks (*e.g.*, the titles of specific licensed programs) and the names and likenesses of persons appearing in programs. The Commission should reject

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[10] NPRM at p. 13.

[11] Id.

[12] *Compare* Comments of Bell Atlantic at p. 22 ("[The] freedom to market packages of programming -- including programming selected by others -- will help to make open video systems competitively viable.") *with* Comments of Rainbow Program Holdings, Inc. at 25 ("Permitting OVS operators to market the services offered by unaffiliated programmers would present countless opportunities for price discrimination, among other things, and discourage independent offering of competing program packages on the OVS system.").

any suggestion that a unified marketing effort on the part of an OVS operator may exist outside of the contractual parameters of the program license agreement.

IV. Retransmission Consent Stations Must Have Negotiating Flexibility

The initial comments of both CBS Inc. and the Association of Local Television Stations, Inc. urge the Commission to clarify that "carriage for carriage" retransmission consent agreements fall outside the 1996 Act's ban on unjust or unreasonable discrimination.[13] While the actual concerns of CBS and ALTS are not absolutely clear, ESPN urges the Commission to clarify that the 1996 Act does not, and is not intended to, regulate the price or other consideration that a broadcast station or programming network can seek for its service. Regardless of whether the consideration involves "carriage for carriage" "cash for carriage," or some other consideration, the retransmission consent station or programming network should have the same flexibility to negotiate an appropriate arrangement with each OVS program provider as it currently does with other multichannel video programming providers.

CONCLUSION

The excitement generated by the new distribution potential of Open Video Systems is evident from the number of initial comments submitted in this proceeding. And, as a programming supplier, ESPN is equally excited about the prospect of new subscribers for its services. However, the Commission must not lose sight of the fact that OVS is merely a new regulatory regime for the distribution of programming, the ultimate

[13] Comments of CBS Inc. at pp. 7 - 8; Comments of Association of Local Television Stations, Inc. at p. 13.

rights to which are held by programming networks and individual program vendors. As the Commission fashions its rules in this proceeding. ESPN urges it to continually recognize and reaffirm the rights of programming providers to control the means and methods of distribution of their product.

Respectfully submitted,

ESPN, Inc.

By _____

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